FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 7 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 660

EDWARD F. WALKER, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR A WRIT OF CERTIORI TO THE SUPREME COURT OF PENNSYLVANIA

DONALD J. GOLDBERG
MICHAEL J. ROTKO
Counsel for Petitioner

One North 13th Street
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
1. Where Petitioner was denied a preliminary hearing, having been indicted on a District Attorney's Bill of Indictment, Petition for which disclosed no emergency but only the risk of the expiration of the Statute of Limitations, which risk was caused by the District Attorney's own lack of dispatch and diligence, was not Petitioner deprived of his rights to due process and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the United States Constitution?	4
2. Where the Indictment charges conspiracy as of certain fixed dates and the testimony fixes the termination of the alleged conspiracy at a time more than two years prior to the Indictment, was not the interpretation of the Statute of Limitations by the Pennsylvania Courts so as to allow the prosecution such that Petitioner was deprived of his rights to due process and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the United States Constitution?	6
Conclusion	7

TABLE OF CONTENTS—*Continued*

Page

Appendix "A" (Order of Supreme Court of Pennsylvania denying allowance of appeal 8

Appendix "B" (Opinion of the Superior Court of Pennsylvania—see Joint Appendix, p. 3a) 8

TABLE OF CITATIONS

Cases:

Commonwealth v. Evans, 190 Pa. Super. 179, 154 A. 2d 57 (1959) 5

Commonwealth v. Hoffman, 396 Pa. 491, 152 A. 2d 726 (1959) 4, 5

Commonwealth v. Hurd, 177 Pa. 481 (1896) 5

Commonwealth v. McCormick, 71 Pa. Super. 567 (1919) 5

Commonwealth v. O'Brien, 181 Pa. Super. 382, 124 A. 2d 666 (1956) 4

Commonwealth v. Petrosky, 194 Pa. Super. 94, 166 A. 2d 682 (1960) 7

Commonwealth v. Prep, 186 Pa. Super. 442, 142 A. 2d 460 (1958) 7

Commonwealth ex rel. Sholter v. Claudy, 171 Pa. Super. 442, 90 A. 2d 343 (1952) 5

Petition of Grace, 397 Pa. 254, 154 A. 2d 592 (1959) .. 5

Grunewald v. United States, 353 U.S. 391 (1957) 7

Krulewitch v. United States, 336 U.S. 440 (1949) 7

Lloyd and Carpenter's Case, 3 Clark 188 (Pa. 1845) .. 4

United States v. Bonnano, 285 F. 2d 408 (2d Cir. 1960) 7

TABLE OF CITATIONS—*Continued*

Page

Pennsylvania Constitution:

Article I, section 10 5

Pennsylvania Statutes:

1915, May 14, P. L. 499 42 P.S. §1080 5

IN THE

Supreme Court of the United States

October Term, 1964

No.

EDWARD F. WALKER, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR A WRIT OF CERTIORI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Edward F. Walker, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on August 10, 1964.

OPINIONS BELOW

The opinion of the trial court (supplemental record) is unreported.

The opinion of the Superior Court of Pennsylvania, handed down on March 19, 1964, is reported at 203 Pa. Super. 34, 199 A. 2d 139 and appears at Appendix "C" (p. 3a) in the Joint Appendix to Petitions for Writs of Certiorari to the Supreme Court of Pennsylvania[1] filed in this

[1] Hereafter referred to as "Joint Appendix."

Court as of October Term, 1964, Nos. 419 and 420, by Petitioner's codefendants—Ben Lapensohn (No. 419), Raymond Cohen, John Joseph Elco, Joseph E. Hartsough and Abraham S. Berman (No. 420).

The order of the Supreme Court of Pennsylvania denying leave to appeal nunc pro tunc from the Superior Court is unreported as yet and is set forth at Appendix "A" hereto (p. 1a).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania denying leave to appeal nunc pro tunc from the decision of the Superior Court of Pennsylvania was entered on August 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Where Petitioner was denied a preliminary hearing, having been indicted on a district attorney's bill of indictment, petition for which disclosed no emergency but only the risk of the expiration of the Statute of Limitations which risk was caused by the District Attorney's own lack of dispatch and diligence, was not Petitioner deprived of his rights to due process and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the United States Constitution?

2. Where the indictment charges conspiracy as of certain fixed dates and the testimony fixes the termination of the alleged conspiracy at a time more than two years prior to the indictment, was not the interpretation of the Statute of Limitations by the Pennsylvania Courts so as to permit the prosecution such that Petitioner was deprived of his rights to due process and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 18, 1959, Petitioner and six other defendants[2] were indicted on a district attorney's bill of indictment charging conspiracy to cheat and defraud a labor union.[3] There had been no preliminary hearing prior to the grand jury's action.

On March 25, 1963, the case proceeded to trial before a jury in the Court of Quarter Sessions of Philadelphia County, as of September Term, 1959, No. 520.

The evidence pertinent to the Statute of Limitations indicated that the last overt act in the alleged conspiracy occurred on September 16, 1959, when a certain check for allegedly illegitimate convention expenses was issued by the Union.

On June 3, 1963—after a trial of ten weeks and one day—the jury returned verdicts of guilty as to all defendants. Motions for a new trial and in arrest of judgment were denied and on July 15, 1963, Petitioner was sentenced to a term of imprisonment for not less than eight nor more than twenty-three months.

An appeal was taken to the Superior Court of Pennsylvania (October Term, 1963, Nos. 273-278) which heard ar-

---

[2] One defendant died prior to trial. Petitioner's five remaining codefendants all have petitioned this Court for Writs of Certiorari (Nos. 419 and 420, October Term, 1964).

[3] 18 Purdon's Pa. Stat. Sec. 4302.

gument on September 9, 1963. On March 19, 1964, the Superior Court affirmed the judgment of the trial court (Watkins, J. dissenting).

On June 29, 1964, Petitioner filed a petition for allowance of an appeal nunc pro tunc from the Superior Court to the Supreme Court of Pennsylvania. This petition was denied per curiam on August 10, 1964 (Appendix "A", p. 1a).

All questions of federal law raised herein were properly raised at both the trial and appellate levels of the state proceeding.

REASONS FOR GRANTING THE WRIT*

1. WHERE PETITIONER WAS DENIED A PRELIMINARY HEARING, HAVING BEEN INDICTED ON A DISTRICT ATTORNEY'S BILL OF INDICTMENT, PETITION FOR WHICH DISCLOSED NO EMERGENCY BUT ONLY THE RISK OF THE EXPIRATION OF THE STATUTE OF LIMITATIONS WHICH RISK WAS CAUSED BY THE DISTRICT ATTORNEY'S OWN LACK OF DISPATCH AND DILIGENCE, WAS NOT PETITIONER DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

At common law and under the relevant cases, Petitioner had a right to a preliminary hearing except in certain circumstances set out *infra*. *Commonwealth v. Hoffman*, 396 Pa. 491, 152 A. 2d 726 (1959); *Commonwealth v. O'Brien*, 181 Pa. Super. 382, 124 A. 2d 666 (1956); *Lloyd and Carpenter's Case*, 3 Clark 188 (Pa. 1845); at such a preliminary hearing Petitioner had a right to be heard on his own

* Reasons for granting Writs of Certiorari as set out in the codefendants' petitions for Writs of Certiorari (October Term, 1964, Nos. 419 and 420) and applicable to Petitioner herein are incorporated by reference.

behalf and/or to present witnesses on his behalf. Act of May 14, 1915, P. L. 499, 42 Purdon's Pa. Stat. Sec. 1080. Denial of this right to a preliminary hearing serves to void subsequent proceedings. *Commonwealth v. Hoffman, supra.* Thus, Petitioner has been denied his rights to due process and equal protection of the law as guaranteed by the Fourteenth Amendment if the bypassing of his preliminary hearing through the use of a district attorney's bill of indictment does not fall within one of the well-recognized exceptions to the right to a preliminary hearing.

The exceptions to the right to a preliminary hearing are as follows:

A. *A presentment by a special investigating grand jury recommending that charges be brought. E.g., Commonwealth v. Evans,* 190 Pa. Super. 179, 154 A. 2d 57 (1959). In *Petition of Grace,* 397 Pa. 254, 154 A. 2d 592 (1959) a case arising out of the instant case, the Supreme Court held such a situation inapposite as to the very charges brought against Petitioner herein.

B. *Where the whereabouts of a fugitive is unknown and there is a danger that the statute of limitations may run. E.g., Commonwealth v. McCormick,* 71 Pa. Super. 567 (1919). This exception is clearly inapplicable; there has been no contention that any of the defendants were fugitives.

C. *Misdemeanors committed by holders of public office:* Article I, Section 10, Pennsylvania Constitution; E.g., *Commonwealth v. Hurd,* 177 Pa. 481 (1896). This exception is also clearly inapplicable to the instant case.

D. *Where the defendant—by some act of his own—prevented the holding of a preliminary hearing and thereby created the risk that the statute of limitations might run.* E.g., *Commonwealth ex rel. Sholter v. Claudy,* 171 Pa. Super. 442, 90 A. 2d 343 (1952). Here again, there is nothing to indicate that any action on the part of any of the defendants

necessitated the use of the district attorney's bill of indictment.

The only reason for bypassing the right to a preliminary hearing was the danger of the running of the statute of limitations. That this possibility arose was due only to the District Attorney's own lack of due diligence. It has never been the law that an important right of a defendant, such as the right to have a preliminary hearing, is to be obviated merely because the prosecution—which by its own admission had in April all of the facts as to the charges which it had in September—fails to act with sufficient dispatch. To hold otherwise violates Petitioner's rights to due process and equal protection of the law.

2. WHERE THE INDICTMENT CHARGES CONSPIRACY AS OF CERTAIN FIXED DATES AND THE TESTIMONY FIXES THE TERMINATION OF THE ALLEGED CONSPIRACY AT A TIME MORE THAN TWO YEARS PRIOR TO THE INDICTMENT, WAS NOT THE INTERPRETATION OF THE STATUTE OF LIMITATIONS BY THE PENNSYLVANIA COURTS SO AS TO ALLOW THE PROSECUTION SUCH THAT PETITIONER WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The Commonwealth failed to prove that any overt act took place within the statutory limit of two years. The last overt act shown was the making of a check on September 16, 1957, by the Union to the order of Joseph Grace (the codefendant who died before the trial began). The check was cashed on September 19, 1957. The indictment was filed on September 18, 1959.

The majority of the Superior Court held that the statute of limitations did not begin to run until the cashing of the check on September 19, 1957. As Judge Watkins pointed

out in his dissenting opinion (Joint Appendix: 37a), the majority's holding was wrong for two reasons. First, the delivery of the check, a negotiable instrument, to Grace was a completed transaction and the last overt act upon which the Commonwealth could rely. *Commonwealth v. Petrosky*, 194 Pa. Super. 94, 166 A. 2d 682 (1960); *Commonwealth v. Prep*, 186 Pa. Super. 442, 449, 142 A. 2d 460 (1958); *cf.*, *Grunewald v. United States*, 353 U. S. 391 (1957); *United States v. Bonnano*, 285 F. 2d 408 (2d Cir. 1960). Second, even if acts occurring after September 16, 1957 were material to the statute of limitations, there was no evidence whatsoever to show to whom the check was paid, let alone that it was paid to Joseph Grace himself.

To interpret the statute of limitations as the Superior Court did in this case is to deprive Petitioner of due process and equal protection of the law and to further add to the ever growing abuses of the conspiracy charge. *See, Krulewitch v. United States*, 336 U. S. 440, 445 (1949) (concurring opinion, Jackson, J.)

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitions of the codefendants in this case, which have been incorporated by reference herein where applicable, Petitioner prays that a Writ of Certiorari to the Supreme Court of Pennsylvania be granted so that the important questions herein may be reviewed and decided by this Court and his constitutional rights thereby protected.

Respectfully submitted,

DONALD J. GOLDBERG

MICHAEL J. ROTKO

Counsel for Petitioner

APPENDIX "A"

ORDER OF SUPREME COURT OF PENNSYLVANIA ON PETITION FOR ALLOWANCE OF APPEAL NUNC PRO TUNC.

"August 10, 1964

Petition Denied

Per Curiam."

APPENDIX "B"

OPINION OF SUPERIOR COURT OF PENNSYLVANIA

(FILED: MARCH 19, 1964)

See, JOINT APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI, IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964, NOS. 419-420 (p. 3a.)